IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

WRIT PETITION NO.1076 OF 2000

Shri. Inthru Noronha ..Petitioner.
Vs.
Colgate Palmolive (India) Ltd. & Ors. ..Respondents.

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Mr. N.M. Ganguli with Mr. K.G. Poojary for the Petitioner.
Mr. J.P. Cama, Senior Advocate with Mr. G.S. Shetty i/b M/s. Crawford Bayley & Co. for the Respondents.

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CORAM : DR.D.Y.CHANDRACHUD, J.

19th January, 2005.

ORAL JUDGMENT :

1. This Petition arises out of an order of the Industrial Court dismissing a complaint filed by the Petitioner complaining of unfair labour practice under Items 5, 9 and 10 of Schedule IV to the Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act, 1971 ("the Act"). The Petitioner joined the service of a company known by the name of Ciba of India Limited (later known as Hindustan Ciba Geigy Limited) on 1st June, 1965

initially as a typist. He was then appointed as a Punch Operator. On 2nd March, 1990 he was promoted with effect from 1st January, 1990 to the post of an Assistant in the Executive cadre. The Petitioner was informed that as a result, with effect from the date of his promotion, his remuneration package would be as indicated in the contract of employment that was furnished to him; that in the matter of gratuity he would be governed by the scheme that was applicable to the executive staff and that he would become a member of the pension scheme applicable to the executive staff with effect from January 1990. The contract of employment provided that the Petitioner shall retire from service at the end of the month in which he would attain the age of superannuation of 58 years.

2. The oral hygiene business of Hindustan Ciba Geigy Limited was transferred to the First Respondent, Colgate Palmolive (India) Limited, from 1st October, 1994. The services of the Petitioner were accordingly transferred to the First Respondent and by a letter dated 24th September, 1994 he was informed that his services will not be

interrupted due to the transfer and that it would be ensured that the terms and conditions of service that were offered would be as then applicable in Hindustan Ciba Geigy Limited. On 17th May, 1995, the First Respondent informed the Petitioner that his salary and benefits were being revised from 1st April, 1995 in accordance with the wage structure of the company that was applicable to employees in the management cadre. The total emoluments of the Petitioner stood increased as a result to Rs.25,625/-. On 8th February, 1999 the First Respondent addressed a letter to the Petitioner informing him that under the superannuation rules he was due to retire on completing the age of 58 which in the case of the Petitioner was 25th February, 1999.

3. The Petitioner moved the Industrial Court in a complaint of unfair labour practices under Items 5, 9 and 10 of Schedule IV of the Act on 23rd March, 1999. The Petitioner claimed therein that the work which he was doing was of a clerical nature; that he was, therefore, for all intents and purposes a workman under Section 2(s)

of the Industrial Disputes Act, 1947 and hence, an 'employee' within the meaning of the Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act, 1971. The material part of the complaint which would be relevant for the decision of this case was thus :

> "The Complainant submits that he is doing entirely clerical duty such as maintenance of leave records of sales personnel, maintenance of personal records of service personnel and follow up of payments from stockists etc. The Complainant submits that the Complainant has no authority whatsoever to commit the company for any purpose whatsoever. No staff is working under the Complainant nor the Complainant is supervising the work of any other person. The Complainant carries out his work as per instructions given to him by the Manager, Sales Administration."

4. The grievance of the Petitioner was that despite the assurance which was furnished to him at the time of the transfer of his services, the conditions of service governing his employment were unilaterally changed by the First Respondent. The Petitioner admitted in his complaint that the retirement age for him was 58 years in Hindustan Ciba Geigy Limited where he was originally employed, whereas

according to him it was 60 years in the First Respondent. The Petitioner stated that he was furnished with an assurance that upon the taking over of the business of the erstwhile company in the Consumer Health Care Division, he would be governed by the conditions of service that would be applicable in his previous employment. In so far as the nature of his duties was concerned, the Petitioner then stated that he was working in the Sales Administration Department and was "looking after the work of Sales Administration of the company irrespective of the products". The relief which was sought in the complaint was a direction to the First Respondent to permit the Petitioner to continue working in the company until he attained the age of 60 years on 28th February, 2001.

5. Evidence was adduced both on behalf of the Petitioner and on behalf of the First Respondent – Management. The First Respondent relied upon extensive documentary material in support of the contention that the Petitioner was not a workman within the meaning of Section 2(s) of the Industrial Disputes Act, 1947 and therefore, not

an employee within the meaning of the Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act, 1971. By an order dated 31st January, 2000 the Industrial Court came to the conclusion that the Petitioner was not a workman and that, therefore, the Court did not have jurisdiction to entertain and try the complaint. The Industrial Court has also entered into the merits of the dispute in order to render a full, final and complete adjudication and has come to the conclusion that the assurance which was given to the Petitioner when his services were transferred to the First Respondent was a continuation of the existing service conditions that were applicable to the Petitioner in his erstwhile employment. The age of superannuation thereunder was 58 years. The Industrial Court has also found that other employees in the executive cadre of Hindustan Ciba Geigy Limited had been retired upon attaining the age of superannuation of 58 years. The complaint has on these findings been dismissed.

6. Counsel appearing on behalf of the Petitioner has urged two

submissions in support of the challenge to the order of the Industrial Court: (i) The duties that were assigned to the Petitioner on promotion as an Assistant in the executive cadre did not specify that he was employed in a managerial, administrative or supervisory capacity; (ii) that the dominant nature of the work that was performed by the Petitioner is clerical or operational and that consequently the finding of the Industrial Court was not based on evidence. Counsel submitted that in deciding the issue the nature of the work rendered by the employee ought to be considered and even if the Petitioner was carrying out work in a managerial or administrative capacity, he was not mainly involved in managerial or administrative work. The Petitioner, it was submitted, was not a part of the policy making team of the First Respondent These submissions will now have to be considered.

7. The jurisdiction of the Industrial Court under Section 28 of the Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act, 1971 can inter alia be invoked by a union or an

employee where any person was engaged in or is engaging in an unfair labour practice. In view of the definition in Section 3(5), the expression "employee" has the meaning ascribed to it in Section 2(s) of the Industrial Disputes Act, 1947. In Section 2(s) the expression "workman" is defined as follows :

> "2(s) "workman" means any person (including an apprentice) employed in any industry to do any manual, unskilled, skilled, technical, operational, clerical or supervisory work for hire or reward, whether the terms of employment be express or implied, and for the purposes of any proceeding under this Act in relation to an industrial dispute, includes any such person who has been dismissed, discharged or retrenched in connection with, or as a consequence of, that dispute, or whose dismissal, discharge or retrenchment has led to that dispute, but does not include any such person -
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> (i) who is subject to the Air Force Act, 1950 (45 of 1950), or the Army Act, 1950 (46 of 1950), or the Navy Act, 1957 (62 of 1957); or
> (ii) who is employed in the police service or as an officer or other employee of a prison; or
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> (iii) who is employed mainly in a managerial or administrative capacity; or
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> (iv) who, being employed in a supervisory capacity, draws wages exceeding one thousand six hundred rupees per mensem or exercises, either by the nature of the duties attached to the office or by reason of the powers vested in him, functions mainly of a managerial nature."

8. The essential attribute of a workman in Section 2(s) is that a person must be employed in an industry to do manual or unskilled, skilled, technical, operational, clerical or supervisory work. The definition excludes from its ambit four categories, the third being a person which is engaged in a managerial or administrative capacity and the fourth a person who is employed in a supervisory capacity drawing wages in excess of Rs.1,600/- per month or who exercises by the nature of the duties attached to his office or by reason of his powers functions mainly of a managerial nature. The interpretation that must be placed on the provisions of this Section is now settled by a decision of a Constitution Bench of the Supreme Court in H.R. Adyanthaya v. Sandoz (India) Ltd. . (1994 II CLR 552). The Supreme Court held that in order for a person to be a workman under the Industrial Disputes Act, 1947 he must be employed to do work of any of the specified categories viz. manual, unskilled, skilled, technical, operational, clerical or supervisory. In other words, it is not enough that a workman is not covered by either of the four exceptions to the definition. The Court held that the earlier decisions in S.K. Verma v.

Mahesh Chandra [(1983) 3 SCR 799] Ved Prakash Gupta v. Delton Cable India (P) Ltd. [(1984) 3 SCR 169] did not lay down the correct position in law. This principle is now settled in view of the judgment of the Constitution Bench.

9. Designations, it is trite law, are not conclusive in deciding as to whether an employee is a workman. The Court must essentially be guided by the nature of duties. An employee may be required to perform duties of a varied nature, some of which may not fall strictly within the category of those duties that are performed by a workman. The Court is then guided by the dominant nature of duties performed by the employee. In the present case, the Petitioner in his complaint of unfair labour practice set up the case that he was performing duties of a clerical nature. The Petitioner stepped into the witness box and in the course of his examination-in-chief stated that he was doing the work of filing and dispatching stationary to the Ciba sales force, scrutinizing and preparing a summary of monthly expenses, checking the follow up work of the regions, dispatching stationary to the sales

force, dispatching prize money statement to the sales force, preparing a summary of zonal data received from stockists, preparing details of sales force who had joined or resigned and updating the sales price list every month. The Petitioner stated that he was also attending to the follow up of cases filed by Ciba as directed by the Legal Department.

10. The cross examination of the Petitioner is material for the purposes of the present case, for in the course thereof the Petitioner inter alia deposed as follows :

> "In the Ciba Co. I was promoted in the executive cadre w.e.f. 1.1.1990 and detailed letter of appointment was served upon me by Ciba Co. it is at Exh.U-22. In Ciba Co. the age of retirement for the typist is 60 years and in the post of typist the terms of service was applicable to me. While on promotion to executive cadre in Ciba Co. the age of retirement was 58 years and I had accepted the same. True to say that this is an annexure to letter dt.2.3.90 laying down detailed terms of my appointment at Exh. U-22. When I was taken as asstt. in executive cadre the term of my probation was of one year. On joining executive cadre there was change in my wage structure. Accordingly stipulated in the annexure. This structure is not applicable to non executive cadre." (emphasis supplied).

The Petitioner then stated that he had been assigned the work of "Sales Administration follow up". According to him the Manager – Sales Administration co-ordinated with the All India Field Force which was engaged in sales promotion and sales activity. He admitted that he along with three other employees was assisting the Manager-Sales Administration in his co-ordination activities and that during the course of every month, the company convened a meeting of Branch Managers and Regional Sales Managers at the head office to discuss business strategies and to take important business decisions. The Petitioner stated that he used to attend those meetings though he claimed that he did not participate thereat. The meetings, the Petitioner stated, were attended by Branch Managers and Personnel from the Sales Administration Department including himself for taking strategic decisions.

11. In so far as the evidence of the management is concerned, the Manager- Sales Administration deposed in support of the case of the company and stated that his principal duties were to co-ordinate in

the field of sales, various departments, to monitor the targets given to the field force and that for this purposes, he was assisted by four administrative officers including the Petitioner who was looking after the branch co-ordination work. The company's witness then stated that during every month Branch Managers meetings were held and all the four persons who were working in Sales Administration were invited to attend these meetings. The Petitioner was one of the participants. In these monthly meetings which were attended by Branch Managers, the Vice-President – Sales, Marketing Managers and Managers from the Manufacturing Department, discussions would take place on the performance of the Branch/Region; growth in the number of stockists or retail outlets, van accounts, outstanding dues from various parties, sales promotion and consumer promotion for the next period of two months. According to the company' s witness, the Petitioner was required to make presentations on issues of growth in accounts, stockists, van markets, outstanding dues from parties, pending legal matters and that he had to prepare minutes of issues which were discussed in the meeting. The nature of duties

discharged by the Petitioner included growth in the number of accounts, stockists, retail outlets and van accounts, outstanding dues of various parties, legal cases that were pending etc. The Petitioner was required to follow up with Branch Managers and Regional Managers on letters from the field staff " on borrowings from the distributors". The Manager- Sales Administration further deposed that the company has a performance appraisal system on a yearly basis which was carried out with reference to the objectives for the year that were given to each individual. Those objectives, he clarified, were based on the main functions of the individual and the appraisal form was signed by the employee concerned including the Petitioner. The witness then deposed that the legal work which was assigned to the Petitioner consisted of cases filed against "duplicate manufacturers" (presumably those who were selling spurious products.). The witness produced several documents including documents to show that the Petitioner was looking after the Ciba field force. The company, he stated, had no clerks as the job profile had been upgraded. The Petitioner, it was stated, was required to make

presentations in monthly meetings by discussing with Branch Managers, or as the case may be, Regional Sales Managers, for which he was required to bring back ups and summary charts for the purpose of discussion. The chart was based on information received by the Petitioner from Branches and Regional Offices. Through the weekly sales report the Petitioner would get information about the leave availed by the Ciba field staff.

12. The nature of the documentary material that was produced in the course of the proceedings before the Industrial Court would now merit consideration. Among the documents were the following :

(i) An authorization dated 20th July, 1990 to the Petitioner, who is described therein as an executive in the Consumer Products Division to file a criminal case in the Court of the Metropolitan Magistrate under Sections 78 and 79 of the Trade and Merchandise Marks Act, 1958 read with the provisions of the Copyright Act;

(ii)Circulars of the First Respondent dated 3rd April, 1997, 16th July, 1997, 21st November, 1997, and 9th July, 1998 intimating allocation of sales administration work. The Petitioner was allocated sales administrative work for regions such as Bombay, Delhi and Lucknow, and the persons to whom the circulars were addressed were asked to get in touch with the Sales Administration personnel for any follow up work pertaining to the region;

(iii)Copies of two purshis dated 27th November, 1998 filed before the Court of the Metropolitan Magistrate, 27th Court, Mulund, Mumbai recording that Hindustan Ciba Geigy Limited which was the complainant did not wish to proceed further with the criminal case which it was prayed may be discharged for want of prosecution;

(iv)Status reports prepared and filed by the Petitioner on 15th October, 1998 and 15th December, 1998 setting out the status of cases filed by the First Respondent against manufacturers of spurious toothbrushes;

(v)A letter dated 23rd February, 1998 by the Petitioner for and on behalf of the First Respondent enclosing a cheque towards monthly expenses;

(vi)A letter dated 24th February, 1997 to the Regional Manager of the First Respondent at Lucknow forwarding the updated leave records of the Ciba sales force for the region and recording that accumulated 140 days of privilege leave had been allowed as a special case.

13. Apart from the aforesaid documentary material, reliance has been placed before the Industrial Court on the performance assessment form that was filled out by the Petitioner as part of his annual appraisal during the period 1st January, 1997 to 31st December, 1997. The performance appraisal form sets out, with reference to the employment to the Petitioner, the key objectives which the company's witness deposed were identified with the main

functions of the employee. While these functions were identified in the performance appraisal form, the Petitioner made a self appraisal with reference to these functions or duties that were assigned to him. An extract from the performance appraisal form would be material for the present purposes and is as follows :

Employee I. NORONHA	***Title Executive – Sales Admn.***
Manager : V.KUMAR	Title : Manager- Sales Admn.
Objectives: Specify key performance objectives in order of importance with KPI's (i.e. - targets set/completion dates) and those related to BACP Assign a % weightage for BACP objectives (Min 2/Max 4) against the said objectives	Individual's comments on results achieved against each objective: Describe and complete a self assessment of results achieved against each individual objective

Employee I. NORONHA	***Title Executive – Sales Admn.***
1. Verifying & settling of all Cibaca claims	Most of the claims verified & settled. Few are pending as they were received late/under dispute. Regular follow-up done with RMs./ Levis, Finance & Ads.
2. Liquidation of Cibaca stocks with Ads	All stocks with Ads liquidated by regular follow-up with Rms
3. Correct leave position of Cibaca Sales force to be prepared	Leave records of sales personnel updated upto 31.3.97 and sent to HR and Regions
4. Communications of any Cibaca queries to be addressed	All queries, claims etc. from Regions & Cibaca sales force attended & replied promptly
5. Average retail sales, state wise of Cibaca by SKU for 1995-96 to be provided	Average Retail sales statement prepared for 1996 and handed over to V.Kumar
6. Analysis of performance reports	Analysis done and report handed over to Mr. V. Kumar
7. Follow-up and ensure completion of appraisals for Cibaca ... by end Feb	Completed by end February
8. Follow-up of court cases against manufacturers of spurious Cibaca & Colgate toothbrushes	Attended court cases regularly and settled all cases in different courts (by out of court settlement)
9. Follow-up with Mumbai Region	Ongoing process

14. On the basis of this evidence which has emerged on the record, it is clear that the Petitioner who had initially joined the services of Ciba as a typist on 1st June, 1965 and was later appointed as a Punch Operator was promoted to the executive cadre with effect from 1st January, 1990. From the deposition of the Petitioner, it is evident that (i) The Petitioner admitted that he was promoted to the executive cadre under a letter of appointment that was served upon him; (ii) The Petitioner admitted that the promotion was from a lower cadre to the executive cadre; (iii) On joining the executive cadre, there was a change in the wage structure and the Petitioner was aware that this structure is not applicable to the non-executive cadre; (iv) The Petitioner was aware of the fact that on his promotion to the executive cadre his age of superannuation would be 58 years; (v) The Petitioner admitted that he was carrying out duties related to sales administration and that the meetings that were attended every month by the Branch Managers and Personnel from the Sales Administration

Department, were to take strategic decisions. The documentary evidence which was adduced on behalf of the employer would demonstrate that the Petitioner was authorized to file criminal cases on behalf of the First Respondent and that the authorization specifically referred to him as being an executive. The Petitioner was allocated sales administration work in several regions including Mumbai, Lucknow and Delhi. The documentary material shows that he had in exercise of his authority filed a purshis before the Metropolitan Magistrate for the withdrawal of a criminal case instituted by the company; that he had prepared under his own signature status reports on cases that were filed by the First Respondent against manufacturers who were passing off spurious products as products of the company. The First Respondent had authority to sign for the company. Evidently one of his duties was the updation of leave records of the Ciba sales force and one of the documents on record includes a communication to the Regional Manager at Lucknow informing him that accumulation of more than 140 days' leave had been allowed as a special case. Apart from this material what is of

significance is the performance appraisal report of the Petitioner in which the Petitioner has himself made a self appraisal with reference to his own functions. These functions include verifying and settling of all Ciba claims, liquidation of Ciba stocks with authorized dealers, preparation of the leave position of the Ciba sales force, analysis of performance reports and follow up of court cases against manufacturers of spurious Ciba and Colgate tooth brushes. The Petitioner responded by stating that most of the claims have been verified and settled, that all stocks with authorized dealers have been liquidated by regular follow up, that leave records have been updated, that all queries and claims from the regions and sales force have been attended to and replied promptly and that he had attended to court cases regularly and had settled cases in different courts by out of Court settlements.

15. On the basis of this material on the record, it is not possible for the Court to agree with the submission of Counsel for the Petitioner that the work performed by the Petitioner was of a clerical or

operational nature. The Petitioner, as the evidence in this case would show, was promoted to the executive cadre and this promotion involved a material change in his emoluments in accordance with the wage structure of the First Respondent that was applicable to the executive cadre. He was informed that his gratuity would be governed by the scheme applicable to executive staff and that he would become a member of the pension scheme applicable to executive staff with effect from January 1990. The Petitioner was informed that his age of superannuation as a member of the executive staff would be 58 years. In that cadre, the salary of the Petitioner was revised from time to time, something which the Petitioner accepted in the course of his cross examination. The Petitioner admitted that after his absorption in the First Respondent, besides the increase in salary he had received an enhancement of his allowances such as house rent allowance, conveyance allowance, education and city compensatory allowance. The contention of the management that the Petitioner was an employee who was engaged in a managerial capacity has been upheld by the Industrial Court in this case. The

Industrial Court has noted that save and except for a bare assertion that he was doing work of a clerical nature, the Petitioner did not produce any cogent documentary material on the record to substantiate his case. On the other hand, the documentary material which was placed by the First Respondent on record showed that the duties which were discharged by the Petitioner were of an administrative and managerial nature. The Industrial Court has discussed the documentary material which was produced by the First Respondent and has had due regard to the duties that were performed by the Petitioner in arriving at its conclusion. The Industrial Court was conscious of the position in law that it was not enough for the complainant to show that he did not fall within any of the exclusionary clauses in Section 2(s), but that it would be necessary to establish that the nature of work brought the employee within the substantive part of the provision. This as already noted is consistent with the position in law which has been laid down by the Supreme Court in H.R. Adyanthaya (supra) In the present case the Industrial Court on the basis of the material before it was justified in coming to

the conclusion that the Petitioner did not fall in any one of the categories specified in the substantive part of Section 2(s). The work that was performed by the Petitioner was not work of a clerical nature as sought to be contended by him. Nor for that matter did the Petitioner fall in any of the other categories set out in the substantive part of Section 2(s). That being the position and consistent with the law which has been laid down by the Constitution Bench of the Supreme Court, the question as to whether the Petitioner fell in any one of the excepted categories is of subsidiary importance. Be that as it may, in order to render a full and complete adjudication in this matter, it is also necessary to determine as to whether the work that was performed by the Petitioner was one in which he was employed mainly in a managerial or administrative capacity.

16. The question as to whether an employee is employed mainly in a managerial or administrative capacity cannot be determined on a priori consideration. Essentially an employee engaged in a managerial capacity is called upon to look after the interests of the

management; to discharge a part of the function of furthering the business of the employer and in a manner which would warrant a degree of independence in action within the limits of authority. Those in management direct or conduct the affairs of the company and an employee who is engaged in a managerial capacity is called upon to take decisions in furtherance of the business and policy of the management and in a manner that would bind the management. Some element of guidance can usefully be received by the Court from the manner in which the expressions 'manager' and 'managerial' have been expounded in dictionaries and decided cases. In Words & Phrases Legally Defined (Butterworths, 3rd Edition page 93). The phrase “manager of the company” is explained thus:

> “The phrase “manager of the company”, prima facie, according to the ordinary meaning of the words, connotes a person holding, whether de jure or de facto, a post in or with the company of a nature charging him with the duty of managing the affairs of the company for the company's benefit.”

17. The Court of Appeal, in its judgment in **Re a Company**

(1980) 1 All ER 284, interpreted Section 441 of the Companies Act 1948. The question was whether an employee had committed an offence in connection with the management of a company's affairs. Lord Denning M.R. held thus :

> "The expression "manager" should not be too narrowly construed. It is not to be equated with a managing or other director or a general manager. As I see it, any person who in the affairs of the company exercises a supervisory control which reflects a general policy of the company for the time being or which is related to the general administration of the company is in the sphere of management. He need not be a member of the board of directors. He need not be subject to specific instructions from the board. If he fulfills a function which touches the central administration of the company, that in my view is sufficient to constitute him an officer or manager of the company for the purposes of s 441 of the 1948 Act."

18. *Words* & *Phrases* has an extract in the application of Canadian Law, more particularly, the Labour Relations Act of 1950 in relation to the meaning of the expression 'managerial':

> "**Canada** 'It is obvious, I think, that "managerial" [in the Labour Relations Act, RSO 1950, c 194 (see now RSO 1980, c 228) means something pertaining to or characteristic of a manager and it is equally obvious that the word "manager" means one who manages.... It [manage] apparently includes the action or

> manner of conducting affairs or administering and directing or controlling any matter. It is obvious, I think, that the essential meaning of the word is to control and direct and that must obviously include not only administration but direction of planning for any particular enterprise. That obviously involves not only planning but the collecting and collating of information from which plans may be evolved.' Re Canadian General Electric Co. Ltd. and Ontario Labour Relations Board [1956] OR 437 at 443, Ont SC, per Wells J; reversed on other grounds, [1957] OR 316".

19. Black's Law Dictionary, (1999 7th Edition) defines the expression "management" as consisting of the people in a company who are responsible for its operation. There is then a reference to the middle management, the top management and to a manager who are defined thus :

> "Middle management : People who manage operations within a company and execute top management's directives.
>
> Top management : The highest level of a company's management at which major policy decisions and long term business plans are made.
>
> Manager : 1) A person who administers or supervises the affairs of a business, office or other organization. General Manager: A manager who has overall control of a business, office or other organization including authority over other managers. A manager is usually equivalent to the president or the CEO of a corporation."

20. In Webster Illustrated Contemporary Dictionary (Encyclopedic Edition), the expressions manage, management, manager and managerial are defined thus :

> “Manage:
> 1)To direct or conduct the affairs or interests of.
> 2)To control the direction, operation etc. of
>
> Management:
> 1) the act, art or manner of managing, controlling or conducting.
> 2) the skillful use of means to accomplish a purpose
> 3) managers or directors collectively
>
> Manager:
> 1) one who manages; especially one who has the control of a business.
> 2) one who directs or oversees the affairs of a household, athletic team etc.
>
> Managerial : of, pertaining to, or characteristic of a manager or management.”

21. Bouvier's Law Dictionary (Unabridged Rawl'es Third Revision Vol.2 page 2073) defines these expressions as follows :

> “Manage : Direct; control; govern; administer; oversee.

> Manager : A person appointed or elected to manage the affairs of another. A term applied to those officers of a corporation who are authorized to manage its affairs.
> On who has the conduct or direction off anything."

22. Chambers 20th Century Dictionary (1983 Edition page 764) has the following meaning ascribed to the expression 'manager' and 'managerial' :

> "Manager "one who manages: in an industrial firm or business, a person who deals with administration and with the design and marketing etc. of the product, as opposed to its actual construction: one who organizes other people's doing.
>
> Managerial : pertaining to management or to manager."

23. In S.K. Maini v. Carona Sahu Co. Ltd. (1994 II CLR 359) the Supreme Court held that a manager or an administrative officer is generally invested with the power of supervision in contradistinction to the stereo typed work of a clerk. The Court relied upon the earlier judgment in Lloyds Bank Ltd. v. Panna Lal Gupta (AIR 1967 SC 428) where it was held that a manager or administrator generally occupies a position of command or decision and is authorized to act in certain

matters within the limits of his authority without the sanction of his superior. While construing whether a person was in a position of management with reference to the provisions of the Madras Shops & Establishments Act, 1947, a Single Judge of the Madras High Court held thus in Standard Vacuum Oil Co. v. The Commissioner of Labour (AIR 1960 Madras 288):

> "...in order to be in a position of management it is not necessary that the individual should be at the top of the heirarchy or that he should have absolute power in any respect: for except in a dictatorship there is always some one over everybody. It is not even necessary that the individual should be in sole control or charge of a territory or branch of an organization or of a department of that organization. That control or charge may be vested in a committee or board, or it may be divided among a number of individuals.
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> Section 4(1)(a) itself contemplates that there can be a distribution of managerial power because it speaks of persons employed in an establishment in a position of management. It will be noticed that the words used are not "the manager of an establishment" or " a person employed in an establishment as its manager", but "of persons employed in any establishment in a position of management." The words postulate that there can be a plurality of persons in an establishment who are in a position of management.
>
> (15) Though the section speaks of persons in a position of management, it does not say of what they have to be in management; we are left in this respect to our own devices.

> But, it is not difficult to see that the management which the section envisages and with which a person may be entrusted may be in respect of matters pertaining to a particular area or territory, or it may be in respect of matters falling within a department sector or compartment. It would not be right to say that a person is not in a position of management unless he has jurisdiction over any definite territory; managerial position can be attained also inside a department."

24. This Court has had occasion to deal with the issue in a line of judgments to which it would be appropriate to now turn. Two decisions of Mr. Justice F.I. Rebello delivered on 16th March, 2000 deal with the issue as to whether an employee can be regarded as being engaged in a managerial capacity. In Aloysius Nunes v. M/s. Thomas Cook India Ltd. (2000 II CLR 649) the learned Judge accepted the dictionary meaning of the expression" manager" as one who has the conduct or direction of anything, a person who manages a company, department and institution or like entity. A manager has been defined as a person who controls and administers a business or part of a business. The expression implies certain control and authority. That a person has no subordinate does not imply that he has no control or authority. In Dhruba Kumar Changkokoti v. Travel

Corporation of India Ltd. (2000 II CLR 644) where the employee concerned was appointed as in charge of the work of a travel agent in Soviet Union/ Eastern Europe, the Court noted that the employee was required to correspond with other organizations on behalf of his employer; that he was looking after the business and was promoting the business of the employer in a certain territory. He was in other words held to be discharging a part of the function on behalf of the employer viz. that of promoting the business and was, therefore, engaged in a managerial capacity. A Division Bench of this Court recently had occasion to revisit the issue in C. Gupta v. Glaxosmithklin Pharmaceutical Ltd. (2004 II CLR 23). In that case, the employee was appointed as an Industrial Relations Executive in the management staff cadre and he was required to represent the management before statutory authorities and other judicial and quasi judicial bodies. He was entitled to several perquisites which were not available to persons who were engaged as workmen and was empowered to authorize payments of substantial amounts for and on behalf of the company. The employee was required to assist the

Industrial Relations Manager in developing a framework of settlement with trade unions. The Division Bench held on these facts that the employee was "clearly a part of the managerial process of the company in so far as his work was used as a tool and aid by the management for a proper conduct of the business of the company". The job of the employee, held the Division Bench, was to secure the interest of the management and he was given independent work which could only be deemed to be managerial in nature.

25. In deciding a case such as the present, the Court must be careful not to place its construction of legal categories into a strait jacket. Business in recent years has been marked by rapid organizational changes. The swift evolution of technology has led to a quantum change in the business environment. Modern managements have to alter the structure of organization in order to meet the exigencies of the time. Every employee in the managerial cadre may not necessarily have the power to appoint or dismiss personnel nor indeed would an employee engaged mainly in a

managerial or administrative capacity always have the power to sanction leave applications. Similarly, the test of the existence of control over subordinates may be applicable in certain factual situations, but not necessarily in every conceivable case. In others, control over subordinates may not necessarily be by all personnel in the managerial cadre. The number and strength of the subordinate staff depends upon the nature of the business that is being conducted. It would, for instance, be wholly inappropriate to apply the same test which would govern the organization of a traditional form of manufacturing business to a business founded on software, bio-genetics or a business at the cutting edge of technology. The interpretation of Section 2(s) must be such as would not lead to stultifying innovation, development and change in managerial practice. Business managers should have a high degree of latitude to promote efficiency in a competitive business environment. Courts are of course vigilant to deal with subterfuge. The important thing for the Court is to evaluate the position of an employee with reference to the nature of his duties in the context of the business where those duties

are performed. While traditional tests are undoubtedly of relevance, the weightage which is to be ascribed to each factor must necessarily vary having regard to the nature of business. In so far as the facts of the present case are concerned, it is not possible to accede to the submission that the work which was being done by the Petitioner was essentially of a clerical or operational nature. The nature of his work would show that the functions of the Petitioner, going by what he himself described as his functions in his performance appraisal form, was anything but clerical. In the circumstances, the finding which was arrived at by the Industrial Court to the effect that the Petitioner was not a workman does not warrant interference under Article 226.

26. The Court is called upon in these proceedings to exercise its jurisdiction to issue a writ of certiorari under Article 226 of the Constitution. In Surya Dev Rai v. Ram Chander Rai ((2003) 6 SCC 675) the Supreme Court held that certiorari under Article 226 is issued for correcting gross errors of jurisdiction when the subordinate Court is found to have acted (i) without jurisdiction - by assuming

jurisdiction where there exists none; or (ii) in excess of its jurisdiction - by overstepping or crossing the limits of jurisdiction; or (iii) acting in flagrant disregard of law, rules of procedure or of the principles of natural justice where no procedure is specified, thereby occasioning a failure of justice. The supervisory jurisdiction is not available to a mere error of fact or law unless the error is manifest or apparent on the face of the proceedings such as when it is based on clear ignorance or disregard of the provisions of law or a gross injustice has been occasioned.

27. The order of the Industrial Court does not fall in any one of these special categories to warrant the exercise of jurisdiction under Article 226. In fact, on a review of the material on the record, I have come to the conclusion that the Industrial Court was correct in its approach and justified in its conclusion.

28. In view of the finding that the Petitioner is not a workman, the merits of the determination made by the Industrial Court do not really

fall for consideration. However, it would be pertinent to note that the Industrial Court has found, based on the letter of appointment that was issued to the Petitioner, that his age of superannuation was 58 years. The management also tendered a list of 123 employees belonging to the erstwhile Hindustan Ciba Geigy Limited. Those amongst these employees who were in the executive staff were retired upon the completion of the age of 58 years whereas those who fall in the category of workmen were retired at the age of 60 by the First Respondent. Counsel for the First Respondent has stated before the Court that in order to obviate the grievance of the Petitioner that he has not been given the benefit of the conditions of service applicable to the erstwhile staff of Hindustan Ciba Geigy Limited, the First Respondent would give to the Petitioner the benefit of the pension scheme as applicable to the executive staff of the erstwhile division of Hindustan Ciba Geigy Limited, which came to be transferred to the First Respondent. This assurance which has been furnished to the Court on behalf of the First Respondent is accordingly recorded and accepted.

29. In the circumstances of the case, I do not find any reason to interfere with the impugned order of the Industrial Court. The Petition shall, in the circumstances, stand dismissed. There shall be no order as to costs.